



**Issue Date: 04 October 2007**

**CASE NO.: 2007-STA-39**

**IN THE MATTER OF**

**CRAIG HORNE,**

Complainant

vs.

**UNITED PARCEL SERVICE, INC. (OHIO),**

Respondent

**RECOMMENDED DECISION AND ORDER ON  
MOTION FOR SUMMARY DECISION**

*Procedural Background*

This proceeding arises under the Surface Transportation Assistance Act (STAA)<sup>1</sup> and the employee protection regulations promulgated thereto.<sup>2</sup> The Secretary of Labor is empowered to investigate and determine “whistleblower” complaints filed by employees of commercial motor carriers who are allegedly discharged or otherwise discriminated against with regard to their terms and conditions of employment because the employee refused to operate a vehicle when such operation would violate a regulation, standard, or order of the United States related to commercial motor vehicles. The complaint was brought by Craig Horne (Complainant) against United Parcel Service, Inc. (Respondent). Complainant objected to the findings of the initial investigation by the Occupational Safety and Health Administration (OSHA) and requested a hearing. The hearing was initially set for 27 Aug 07. However, pursuant to Complainant’s motion for a continuance, the hearing was reset for 3 Oct 07. On 13 Sep 07, Respondent filed a Motion for Summary Decision supported by a number of exhibits. A show cause order was entered and Complainant responded by filing an affidavit.

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<sup>1</sup> 49 U.S.C. § 31105.

<sup>2</sup> 29 C.F.R. Part 1978.

## *Law*

The Act prohibits employers from taking adverse action against an employee if “the employee refuses to operate a vehicle because . . . the employee has a reasonable apprehension of serious injury to the employee or the public...”<sup>3</sup>

Parties are allowed to seek a summary decision without a full hearing.<sup>4</sup> They are entitled to a summary decision if:

The pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision.<sup>5</sup>

Any affidavits submitted with the motion shall set forth such facts as would be admissible in evidence in a proceeding subject to 5 U.S.C. 556 and 557 and shall show affirmatively that the affiant is competent to testify to the matters stated therein. When a motion for summary decision is made and supported as provided in this section, a party opposing the motion may not rest upon the mere allegations or denials of such pleading. Such response must set forth specific facts showing that there is a genuine issue of fact for the hearing.<sup>6</sup>

In a motion for summary disposition, the moving party has the burden of establishing the "absence of evidence to support the nonmoving party's case."<sup>7</sup> In reviewing a request for summary decision, all of the evidence must be viewed in the light most favorable to the nonmoving party.<sup>8</sup> However, a party cannot create a genuine issue of fact sufficient to survive summary judgment simply by submitting an affidavit that directly contradicts his previous testimony or sworn statement without explaining the contradiction or attempting to resolve the disparity.<sup>9</sup>

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<sup>3</sup> 49 U.S.C. §31105(a)(1)(B)(ii).

<sup>4</sup> 29 C.F.R. § 18.40.

<sup>5</sup> 29 C.F.R. §§ 18.40(d), 18.41(a).

<sup>6</sup> 29 C.F.R. § 18.40(c).

<sup>7</sup> *Wise v. E.I. DuPont De Nemours and Co.*, 58 F.3d 193 (5th Cir. 1995).

<sup>8</sup> *Anderson v. Liberty Lobby*, 477 U.S. 262 (1986).

<sup>9</sup> *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795, 806 (1999); *Albertson v. T.J. Stevenson & Co., Inc.*, 749 F.2d 223, 228 (5<sup>th</sup> Cir. 1984).

## *Discussion*

### Positions of the Parties

Complainant was advised to seek the assistance of counsel, but proceeds pro-se. Although he filed no formal administrative complaint with this court, according to the OSHA summary, he alleges that Respondent fired him on 28 Dec 06 because he refused to operate a truck while he was ill and fatigued as a consequence of high blood pressure.

In its motion for summary decision, Respondent argues that Complainant's real concern was related to pay and that he was discharged for refusing to operate a truck on 27 Dec 06. Respondent submits that it took action on that day to terminate Complainant's employment, but was required to allow Complainant to remain on the job until the 10 day union grievance period expired.

### Evidence

In support of its motion, Respondent submitted the following evidence:

#### *The affidavit of Respondent's supervisor:*

He stated that on 27 Dec 06, he instructed Complainant to shift a trailer and Complainant refused. He repeated the assignment and informed Complainant that he could get a warning letter if he refused again. Complainant refused to comply. He told Complainant a third time to shift a trailer and warned Complainant he could receive a notice to suspend. Complainant again refused. He gave Complainant a fourth instruction and warned him he could be terminated if he failed to comply. Complainant refused. He then issued Complainant a notice to terminate. That was followed by a meeting with the manager and union steward. The next day, he again told Complainant on multiple occasions to shift trailers and Complainant refused. The same steps were followed and Complainant received another notice of termination. Complainant then began stating he was sick and lay down on the sorter belt, halting Respondent's operations. The police were called to remove Complainant, but they called an ambulance when Complainant told them he was sick and could not move. Complainant never mentioned that he was concerned that shifting trailers might cause injury to himself or others. Complainant did ask if he was entitled to higher pay for shifting trailers.

*The affidavit of Respondent's manager at the site at which Complainant worked:*

He stated that on 27 Dec 06, Complainant's supervisor issued Complainant warning, suspension, and termination notices for Complainant's repeated failure to follow instructions. He conducted a center-level hearing with Complainant, Complainant's supervisor, and Complainant's union steward. At that meeting Complainant was advised he was on a working termination and had 10 days to file a grievance. The next day, Complainant's supervisor contacted the manager and said Complainant was once again being disruptive. The police were called to remove Complainant from the workplace, but when Complainant reported he was sick, an ambulance was called. Complainant did not return to work and was issued an additional notice to terminate, based on his actions on 28 Dec 06. Complainant failed to file a grievance concerning either notice within the required 10 days. The decision to terminate Complainant based on the 27 Dec 06 notice was effective after the 10 day period expired and the events of 28 Dec 06 were irrelevant.

*The Collective Bargaining Agreement, which provides:*

An employee has 10 days to appeal a discharge notice.

*Texas Workforce Commission on Equal Rights forms showing:*

Complainant filed a complaint that he was terminated by Respondent on 28 Dec 06, because he was out sick and that others of different races in the same situation were given sick days.

*Complainant's deposition, in which he stated:*

He has had high blood pressure for a couple of years. Sometimes it makes him weak, nauseated, and disoriented. One of the things that caused him stress and added to his high blood pressure was that he believed Respondent owed him about \$30,000 in back pay. A driver from Dallas had explained to Complainant that, based on different job tasks and codes, Complainant was entitled to more money. Complainant believed he should be paid more for trailer shifting than he was. He asked his supervisor why he was not getting paid more.

Respondent was aware of his blood pressure problems and had accommodated them. Complainant had on previous occasions asked to be released from a task because of his blood pressure and had been allowed to stop.

On 27 Dec 06, he was not feeling very good because of his blood pressure. His supervisor asked him to shift trailers, but he told the supervisor he would not do it because he was not getting the correct pay. They had a discussion about whether Complainant needed to bring a pay stub for the supervisor to see, but he still

refused to shift the trailers. Later in the day, there was a dispute about whether Complainant was insubordinate by intentionally letting boxes go by on the sorter belt. Eventually, he then had another conversation with his supervisor, the manager, and the union shop steward. He told them he was refusing to shift trucks because of the pay issue.

He had already been told on 27 Dec 06 that he was fired, by the time he was involved in the incident on 28 Dec 06. On that day his supervisor wanted him to shift trailers but he told the supervisor he did not feel well. After the supervisor gave him another termination notice, Complainant had an anxiety attack and lay down on the sorter belt. He was taken by ambulance to the hospital.

He believes that it was the site manager's decision to fire him and that it was just because of the back pay issue. Everything changed when he started asking about back pay.

In response, Complainant submitted an affidavit stating:

He was fired from his job on 28 Dec 06 for refusing to drive a truck while he was sick and unable to drive safely. He asked to have someone else do it for just that day. The statements in the affidavits of his supervisor and the manager are not true. He was a faithful worker with no problems until he asked about his pay. He was being cheated out of his money and the union was no help because it was working with Respondent to cover up unfair treatment of black employees.

### Analysis

There is no evidence that creates a genuine issue of fact which would allow a fact finder to determine that on 27 Dec 06, as a part of his refusal to shift trailers, Complainant raised his physical condition and corresponding safety concerns. Likewise, there is no evidence that creates a genuine issue of fact which would allow a fact finder to determine that on 27 Dec 06, Respondent did not fire Complainant for his refusal to shift trailers.<sup>10</sup> Finally, there is no evidence that creates a genuine issue of fact which would allow a fact finder to determine that, even taking into account the events of 28 Dec 06, Respondent fired Complainant because of his claims that shifting trailers would be unsafe.

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<sup>10</sup> There is some minor factual dispute about the number of and timing of warnings given, but none relate to the fact that Respondent fired Complainant on 27 Dec 06. While it might be circumstantial evidence of motive in the presence of protected activity, the degree of compliance with the collective bargaining agreement is not directly relevant to this motion.

In short, there is no evidence of protected activity on 27 Dec 06. Given the termination that took place on that date, the events of 28 Dec 06 are moot, and the motion for summary decision must be granted. However, even if that were not the case, Complainant's deposition testimony and his own affidavit in opposition to Respondent's motion establish that there is no genuine issue of material fact that allows for the conclusion that Respondent was acting in retaliation for any protected activity.

Accordingly, Complainant's complaint is dismissed.

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**PATRICK M. ROSENOW**  
**Administrative Law Judge**

**NOTICE OF REVIEW:** The administrative law judge's Recommended Decision and Order, along with the Administrative File, will be automatically forwarded for review to the Administrative Review Board, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, DC 20210. *See* 29 C.F.R. § 1978.109(a); Secretary's Order 1-2002, ¶4.c.(35), 67 Fed. Reg. 64272 (2002).

Within thirty (30) days of the date of issuance of the administrative law judge's Recommended Decision and Order, the parties may file briefs with the Board in support of, or in opposition to, the administrative law judge's decision unless the Board, upon notice to the parties, establishes a different briefing schedule. *See* 29 C.F.R. § 1978.109(c)(2). All further inquiries and correspondence in this matter should be directed to the Board.